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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 278

ROYAL INSURANCE COMPANY, LTD., *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 279

NATIONAL FIRE INSURANCE COMPANY, *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 280

FIRE ASSOCIATION OF PHILADELPHIA, *Petitioner*,
vs.
SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, STATE OF OKLAHOMA, *Respondent*. — No. 281

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

There are four of these cases. The fundamental facts are the same in each; therefore, for convenience they have been briefed as one.

The cases are here on Writs of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

These actions are by Respondent to recover upon policies issued by petitioners insuring respondent's school building and the furniture and equipment therein against loss by fire.

Respondent recovered judgments in the United States District Court for the Western District of Oklahoma against each of the petitioners.

The Circuit Court of Appeals struck petitioner's Bill of Exceptions from the files for the reason it did not conform to the rules of the Court and considered the case upon the transcript of the record only.

The judgments were affirmed by the Circuit Court of Appeals.

Petitioners have raised two questions only which they have discussed in their brief under two propositions. Under the first they contend respondent was not entitled to interest prior to date of the judgments; under the second they contend respondent's amended petitions do not state a cause of action for the reason they show verified proofs of loss were not furnished in the manner provided in the policies. We will discuss these questions in the same order they appear in Petitioner's Brief.

FIRST PROPOSITION.

Was respondent entitled to interest prior to the date of the judgments?

The Trial Court was of the opinion the question of interest was one of law and with the consent of all parties passed upon that question, after the verdicts were returned. Accordingly he instructed the Jury (R. 412) it should not take into consideration the

question of interest as that question would be determined by the Court as a matter of law.

The policies provide a period of sixty days after the fire for furnishing proofs of loss, and further provide the insurer shall have sixty days after proofs of loss are furnished within which to pay the amount of the loss.

The Trial Court found the proofs of loss were waived within the first sixty-day period and consequently that the loss should have been paid within one hundred and twenty days after the fire. The fire occurred January 2, 1926; therefore, after the verdicts were returned fixing the amount of the loss, the Court in rendering judgment added interest at six per cent per annum from May 2, 1926.

Petitioners have raised no question as to the manner in which interest was allowed but take the position respondent was not entitled to interest at all prior to the date of the judgments.

Petitioners contend the question of interest is controlled by Section 5972 Compiled Oklahoma Statutes 1921, which is quoted in their brief. We contend it is not controlled by that statute. That statute deals with interest upon damages. This is not an action to recover damages but one to recover money due upon contract. Apparently the Circuit Court of Appeals was of the opinion Section 5972 Compiled Oklahoma Statutes 1921 did not apply as it did not discuss that section nor any of the Oklahoma decisions construing it. It does quote Section 5977 Compiled Oklahoma Statutes 1921, which reads:

> "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Thus the State has by express statutory enactment declared that for the breach of an obligation to pay money only, interest shall be added to the amount due. The cause of action here is for the breach of an obligation to pay money only. This Court in *Morley vs. Lake Shore Railway Co.*, 146 U. S. 162 at 168 says when the State has so provided, interest is recoverable.

Petitioners rely upon *City of Chickasha vs. Hollingsworth*, 56 Okla. 341, 155 Pac. 859; *St. Paul Fire and Marine Insurance Company vs. Robinson*, 72 Okla. 269, 180 Pac. 702; *Midland Valley Railway Co. vs. Price*, 127 Okla. 106, 260 Pac. 26; *Speed vs. McMurray*, 73 Okla. 325, 176 Pac. 506; *Hartford Fire Insurance Co. vs. Barnard*, 99 Okla. 44, 221 Pac. 1011; and, *American Eagle Fire Insurance Co. vs. Lively*, 142 Okla. 246, 286 Pac. 797.

City of Chickasha vs. Hollingsworth, supra (decided in 1916) was not an action to recover upon a contract but was for damages on account of having been prevented from fulfilling a contract.

The next case in point of time is *St. Paul Fire and Marine Insurance Company vs. Robinson, supra* (decided April 29, 1919). True that action was to recover upon an insurance policy for loss to growing crops caused by hail. Less than five dollars in interest was involved and the Court held interest was not recoverable prior to judgment, citing *City of Chickasha vs. Hollingsworth, supra*, and no other authority.

Speed vs. McMurray, supra, was for recovery of damages on account of fraud in the exchange of real estate. The Court cites *City of Chickasha vs. Hollingsworth, supra*, only.

In the *City of Oklahoma City vs. Hoke*, 75 Okla. 211, 182 Pac. 692 (decided July 29, 1919) the Court held the plaintiff was entitled to interest upon damages caused to growing crops by flood waters.

The next case in point of time is *Hartford Fire Insurance Company vs. Barnard, supra* (decided December 11, 1923). There the Court held the plaintiff was entitled to interest upon the amount recovered on a fire insurance policy on account of the loss of a used or secondhand automobile. The opinion does not refer to *St. Paul Fire and Marine Insurance Co. vs. Robinson, supra,* but does cite with approval (among other authorities) *Bernard vs. Rochester German Insurance Co.*, 79 Conn. 388, which is cited with approval by the Circuit Court of Appeals in the instant case.

Midland Valley Railway Co. vs. Price, supra, cited by petitioners (decided October 11, 1927) was an action to recover damages for the death of cattle and the expense of burial. The Court held plaintiff was entitled to interest on the amount of his recovery. On the same date, to wit October 11, 1927, the Court decided *City of Tulsa vs. Copp*, 127 Okla. 128, 260 Pac. 16 and held the plaintiff was entitled to interest upon the damage to the wall of the building caused by an excavation for a sewer. It would seem the cost of replacement of a building is as capable of definite ascertainment as the repair of a building. The Court there interpreted the meaning of Section 5972 Compiled Oklahoma Statutes 1921, as follows:

> "It would appear that the proper test to be applied as to whether interest should be allowed before judgment in a given case is not whether the damages are unliquidated or otherwise, but

> whether the injury and consequent damages are complete and not continuing, and can or must be ascertained of a particular time, in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their own opinion or best judgment in assessing the amount to be allowed for past as well as for future injuries or elements that cannot be measured by any fixed standard of value."

Also in holding that the cost of construction or repair of the building is capable of being made certain within the meaning and intent of said section, the Court says:

> "Under present day methods of engineering, construction and standards of value and cost, it would be as possible to ascertain the approximate and reasonable cost of the construction or repair of a building of the character involved in this action, as it would be to ascertain the value of personal property having a fixed or market value, such cost being arrived at by computation of cost of material, labor, and other well-known elements of cost."

It will be seen that by an unbroken line of decisions by the Oklahoma Supreme Court from July 29, 1919, down to October 11, 1927, in almost every conceivable kind of a case, it was held interest was recoverable. It had been the rule as declared by the Oklahoma Court since December 11, 1923 (*Hartford Fire Insurance Co. vs. Barnard, supra*) that interest was recoverable in an action upon a fire insurance policy. This state of the Oklahoma decisions remained undisturbed until April 8, 1930. Thus when these con-

tracts of insurance were made (October 24, 1925); also at the time of the loss (January 2, 1926); also at the time of the trial in the District Court and at the time the case was briefed, argued and submitted to the Circuit Court of Appeals, it was the rule in Oklahoma (as expressly declared by the Oklahoma Supreme Court) that interest was recoverable. April 8, 1930 (ten days before the opinion by the Circuit Court of Appeals) the Oklahoma Court in *American Eagle Fire Insurance Company vs. Lively, supra,* an action to recover on a fire insurance policy for the loss of household goods held that interest was not recoverable.

We believe we are entitled to some protection in having our contract rights enforced according to the law as declared at the time we made our contracts and at the time we sustained the loss and became entitled to our money. *Wade v. Travis County,* 174 U. S. 499, *Burgess v. Seligman,* 107 U. S. 20, and *Kuhn v. Fairmont Coal Co.,* 215 U. S. 349.

We also believe the United States District Court is entitled to some protection in having decided the question in accordance with the rule then existing in the State Courts and likewise the Circuit Court of Appeals in its decision which does not conflict with the decisions of the Oklahoma Court as they existed at the time the case was submitted to that Court. *Burgess v. Seligman, supra,* at p. 34.

It would seem there is no established rule in Oklahoma upon this question. The first insurance case is *St. Paul Fire and Marine Insurance Co. v. Robinson, supra.* There the Court held interest could not be recovered. The next insurance case is *Hartford Fire Insurance Company vs. Barnard, supra.* In that case

the Court held interest was recoverable and does not mention *St. Paul Fire and Marine Insurance Co. vs. Robinson, supra.* Then in the last case, *American Eagle Fire Insurance Co. vs. Lively, supra,* the Court holds interest is not recoverable but does not mention its opinion to the contrary in *Hartford Fire Insurance Co. vs. Barnard, supra.*

We have examined the briefs in *American Eagle Fire Insurance Co. vs. Lively, supra,* and they do not refer to the opinion in *Hartford Fire Insurance Co. vs. Barnard, supra.* We respectfully submit more careful consideration was given this question in the opinion in *Hartford Fire Insurance Co. vs. Barnard, supra,* than in either of the other two insurance cases mentioned.

This apparent confusion in opinions by the Oklahoma Court is doubtless due in part to the fact the question of interest in most cases is of minor importance. Here it involves more than Ten Thousand Dollars ($10,000.00).

The Supreme Court of Wisconsin in *Laycock vs. Parker,* 103 Wisc. 161, 79 N. W. 327, said:

> "The question of interest is one much more often passed upon than carefully considered by the courts. It is usually presented only incidentally to much more important issues, and often decided one way or the other at the close of exhaustive investigation of the other questions, and with the perhaps unconscious feeling that it is not of sufficient magnitude to justify further serious labor."

The Circuit Court of Appeals in its opinion in the instant case quotes this court in *Miller vs. Robertson,* 266 U. S. 243 at 257, 258, in part as follows:

"One who fails to perform his contract is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract. *Curtis v. Innerarity*, 6 How. 146, 154. One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spaulding v. Mason*, 161 U. S. 375, 396."

Therefore, as a matter of right, equity and good conscience, respondent should have interest upon the amount due. The Trial Court found (and the Circuit Court of Appeals affirmed that finding) the amount due from petitioners to respondent should have been paid not later than May 2, 1926. Thus petitioners seek to use respondent's money from May 2, 1926 to January 18, 1929 (date of judgment) without interest and notwithstanding the fact petitioners admitted at the time settlement was attempted (R. 16) that they were liable for approximately $56,000. In cases of this magnitude, if they are not liable for the interest it would always be to their advantage to refuse settlement as they would have the use of the insured's money during litigation without cost.

This Court in *Standard Oil Co. vs. United States*, 267 U. S. 76 (an insurance case) held the government was liable for interest prior to judgment. That case involved loss of or damage to a vessel and its cargo. The loss suffered was as difficult of ascertainment as here.

For other cases on the right to recover interest prior to judgment, see the following:

The Scotland, 105 U. S. 24 at 35; *Southern Pacific Co. v. Arnett,* 126 Fed. 75 (8 C. C. A.); *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *Cox v. McLaughlin,* 76 Cal. 60, 18 Pac. 100; *Huchberger v. Home Fire Ins. Co.,* 12 Fed. Cases 793, Case No. 6821; *Firemen's Fund Ins. Co. v. Haley,* 129 Miss. 525, 92 So. 635; *Cottingham v. National Mutual Church Ins. Co.,* 209 Ill. App. 557, 124 N. E. 822; *Columbia Real Estate & Trust Co. v. Royal Exchange Assurance,* 132 S. C. 427, 128 S. E. 865; *Berry v. Virginia State Ins. Co.,* 83 S. C. 13, 64 S. E. 859; *Olson v. Herman Farmers Mutual Ins. Co.,* 187 Wis. 15, 203 N. W. 743; *Aetna Ins. Co. v. Solomon,* 172 Ark. 169, 287 S. W. 1000; *Continental Ins. Co. v. Nabors* (Texas Civ. App.), 6 S. W. (2d) 151; *Home Ins. Co. v. Bennett* (Texas Civ. App.), 9 S. W. (2d) 432; *Baker v. Northern Assurance Co.,* 214 Mich. 540, 183 N. W. 61, and *Reed v. Continental Ins. Co.* (Del.), 65 Atl. 569.

It seems to us Section 5972 Compiled Oklahoma Statutes 1921, relied upon by petitioners, and dealing with interest upon unliquidated damages, is not applicable to the case here presented. This is not an action to recover unliquidated damages but is an action to recover money due upon contract. That being true, Section 5977 Compiled Oklahoma Statutes 1921 is applicable and expressly provides for interest. A construction by the Oklahoma Supreme Court of a State Statute that is not applicable to the question presented is certainly not binding upon this Court.

Summarized, our position is:

1. As a matter of right, equity and good conscience, respondent should recover interest from the time the loss should have been paid unless there be some well

established rule denying that right which is binding upon this Court.

2. Not only is there no well established rule denying that right, but the Oklahoma statute, Section 5977 Compiled Oklahoma Statutes 1921 expressly commands that interest be allowed.

3. Should we be mistaken in our view that Section 5972 Compiled Oklahoma Statutes 1921 is not applicable, then we say there is no well established rule of construction of that statute by the Oklahoma Court and that this Court should interpret the law of Oklahoma upon this question.

4. The decisions by the Oklahoma Court were clearly in favor of our right to the interest at the time we entered into these contracts of insurance; at the time we sustained our loss; at the time the money became due and payable and at the time we obtained our judgments. Those rights should not now be taken from us by a decision since rendered by the Oklahoma Court and especially one that does not overrule nor mention the long line of cases supporting our right to interest.

5. The judgments in these cases were, at the time rendered, clearly in accord with the Oklahoma decisions and should not now be disturbed.

SECOND PROPOSITION.

Do the amended petitions state facts sufficient to constitute a cause of action? Petitioners contend they do not for the reason proofs of loss were not furnished in the strict manner provided in the policies.

The amended petitions allege that respondent school

district complied with all the terms and conditions of the policies except the provision providing for written verified proofs of loss to be furnished within sixty days after the fire. As to that provision respondent alleges both waiver and estoppel. The question is, first, can such provision be waived by conduct, or the insurer by conduct be estopped to insist upon a compliance with such provision before it is liable; and second, do the amended petitions state facts sufficient to constitute waiver or estoppel or both. The amended petitions are found in the record at 12, 50, 75, and 100. The allegations in each of these cases are substantially the same. In the interest of brevity, we will not quote from the petitions but will state the substance of the allegations necessary for consideration of this question.

In substance the allegations are the policies were issued to respondent on October 24, 1925, through the local agents of the several insurance companies here involved. By these policies respondent school building was insured for $75,000.00 against loss by fire and the furniture and equipment therein for $3,400.00. On January 2, 1926, the building, furniture and equipment were completely destroyed by fire. Respondent within a few hours thereafter, notified the local agents who issued the policies and requested that they notify their respective companies. Within two or three days thereafter each of the companies appointed agents and adjustors (naming them) as their duly authorized agents to investigate the fire, make estimates as to the value of the property destroyed, and settle for said loss. Said agents visited the scene of the fire, made examinations as to the value of the property destroyed and the circumstances

surrounding the fire. Said agents had respondent furnish them the items of the property destroyed and the plans and specifications of the building. At the request of said agents, respondent rendered such assistance as it could to Frank Kebelman, a building contractor selected by said agents to make an estimate of the value of the property destroyed. Thereafter on February 27, 1926, same being the fifty-sixth day after the fire, said agents including said building contractor met with respondent's school board at the scene of the fire for the purpose of discussing a settlement and adjustment of the loss. At said meeting said agents stated to respondent's school board that they had made full and complete investigation as to said fire and the value of the property destroyed and had obtained all and the correct information thereon. Said agents stated there was no question as to the loss of $3,400.00 on the furniture and equipment, and they were ready to pay that sum on that part of the loss. They stated the building was overvalued and could be replaced for approximately $53,000. Said agents then offered respondent approximately $56,000 in full payment for its entire loss on the building, furniture and equipment. Respondent then and there rejected said offer and requested said companies, through their said agents, to replace said building since they contended it could be replaced for approximately $53,000, and since they (said agents) had said building contractor there with his figures to show it could be replaced for said amount. Said agents then and there refused to replace said building.

The only difference between said agents and respondent was the replacement value of said building

which said agents contended was approximately $53,000 and respondent contended was $75,000.00. At said meeting respondent's attention was directed only to the value of said building, and that was the only matter over which there was any disagreement. There was no objection made at any time that proofs of loss had not been furnished, and there was no request for the same. Said conduct of said agents led respondent to believe that the only matter in dispute was the value of the building destroyed. Said companies through the examinations and efforts of their said adjustors and by the assistance of respondent's school board, rendered at the request of said adjustors, obtained all the information that could have been obtained had proofs of loss been furnished in the strict manner provided in the policies. Said adjustors led respondent to believe that they had all the information they desired and that no other or further information or proof was required; that by said conduct and by reason of said facts, said companies waived the furnishing of proofs of loss in the strict manner provided in the policies and that said companies by reason of said facts are now estopped to set up said failure to furnish said proofs of loss as a defense to these actions.

The Trial Court and also the Circuit Court of Appeals held said allegations sufficient to constitute waiver and estoppel.

It seems petitioners do not challenge the sufficiency of these allegations provided waiver or estoppel by conduct can result but apparently take the position there can be no waiver unless such waiver be in writing and attached to the policy.

The Circuit Court of Appeals in the instant case

cites many cases in support of its holdings and is, we believe, in accord with the almost universal rule upon this question.

Petitioners cite no case by this court to the contrary on this question. They cite only one opinion by the Circuit Court of Appeals to the contrary and that is the early case of *Scottish Union and National Insurance Co. vs. Encampment Smelting Co.*, 166 Fed. 231 by the Eighth Circuit. The Court there based its holding largely upon the opinion of this court in the *Northern Assurance Co. vs. Grand View Building Association*, 183 U. S. 308. The latter case did not involve proofs of loss but a covenant against other insurance.

The Eighth Circuit has in two recent opinions virtually departed from its former holding or at least expressed considerable doubt as to the correctness of that holding. *New York Underwriters Fire Insurance Co. vs. Malham & Company*, 25 Fed. (2d) 415, and *Hartford Fire Insurance Co. vs. Empire Coal Co.*, 30 Fed. (2d) 794.

All other cases relied upon by petitioners (except perhaps one or two district court opinions) deal with provisions to be kept or performed before loss occurs; a condition of the insurance; not a condition subsequent to facilitate adjustment of the loss but a condition precedent to liability. For these reasons the Sixth Circuit in *Continental Insurance Co. v. Fortner*, 25 Fed. (2d) 398 and the Ninth Circuit in *Twin City Insurance Co. v. Stockman's National Bank*, 261 Fed. 470, say *Northern Assurance Co. vs. Grand View Building Association*, 183 U. S. 308, and *Lumber Underwriters vs. Rife*, 237 U. S. 605, are to be distinguished from cases holding proofs of loss

may be waived by conduct. This same distinction, if it be sound, applies to *Imperial Fire Insurance Co. vs. County of Coos*, 151 U. S. 452 and *Penman vs. St. Paul Fire and Marine Insurance Co.*, 216 U. S. 311, cited by petitioners.

The Fifth Circuit made the same distinction in *Home Insurance Co. vs. High Tower*, 22 Fed. (2d) 882, in which it said:

> "Provision of policy to effect that conditions thereof cannot be waived have no application to waiver after loss."

This Court denied Certiorari in the above case, 276 U. S. 634.

This Court in *Royal Insurance Co. vs. Martin*, 192 U. S. 149 at 162, held that proofs of loss were waived where the insurer denied liability or refused to pay in any event. That opinion is squarely against petitioner's contention that proofs of loss cannot be waived except by endorsement in writing upon the policy. It would seem if it could be waived by one method of conduct, it could by another.

This Court in *Thompson vs. Phoenix Insurance Co.*, 136 U. S. 287, held that a provision of a policy limiting the time for commencement of an action was waived by conduct.

Other cases holding limitation provisions of a policy may be waived by conduct are:

Steel v. Phoenix Insurance Co., 51 Fed. 715 (9 C. C. A.)

Lynchburg Cotton Mill Co. v. Travellers Insurance Co., 149 Fed. 954 (4 C. C. A.)

Fellman v. Royal Insurance Co., 184 Fed. 577 (5 C. C. A.)

Jackson v. Fidelity and Casualty Co., 75 Fed. 359 (5 C. C. A.)

Other cases holding proofs of loss may be waived by conduct are:

Globe & Rutger's Insurance Co. vs. Prairie Oil & Gas Co., 248 Fed. 52 (2 C. C. A.)

Alliance Insurance Co. vs. Enders, 293 Fed. 485 (9 C. C. A.)

Firemen's Insurance Co. vs. Brooks, 32 Fed. (2d) 451 (6 C. C. A.)

Thus we have the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuits holding that provisions of a policy to be performed after a loss may be waived by conduct, and the only decisions to the contrary is that of *Scottish Union and National Insurance Company v. Encampment Smelting Company, supra*, by the Eighth Circuit.

The decisions of the courts of last resort of each of the States embraced within the Tenth Circuit are to the same effect

Kansas:

German Insurance Co. v. Gray, 43 Kan. 497, 23 Pac. 637.

Ross et al. v. Phenix Ins. Co., 84 Kan. 572, 114 Pac. 1054.

Ring v. Phoenix Assurance Co., 100 Kan. 341, 164 Pac. 303.

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Colorado:

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Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686.

Wyoming:

Kahn v. Traders Ins. Co., 4 Wyo. 419, 34 Pac. 1059.

New Mexico:

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Oklahoma:

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American Ins. Co. v. Ott, 97 Okla. 125, 223 Pac. 121.

Atlas Assurance Co. v. Leonard, 108 Okla. 150, 234 Pac. 771.

Great American Ins. Co. v. Herrington, 127 Okla. 13, 259 Pac. 582.

Utah:

West v. Norwich Union Fire Ins. Co., 10 Utah 442, 37 Pac. 685.

Osborne v. Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103.

Loftis v. Pacific Mutual Ins. Co., 38 Utah 532, 114 Pac. 134.

We submit the decision of the Tenth Circuit on this question in the case at bar is in accord with the great weight of authority and should not be disturbed.

CONCLUSION.

We respectfully submit the decision of the Circuit Court of Appeals is correct on both questions presented and should be in all things affirmed.

Respectfully submitted,

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